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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN B. DIAZ,

Defendant and Appellant.

F074695

(Super. Ct. No. DF011992A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

Jonathan E. Berger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Catherine Chatman, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant Juan B. Diaz was sentenced to two consecutive life terms plus a determinate term of 11 years for the premeditated attempted murders of his wife and mother-in-law and other crimes and enhancements. At trial, his defense was that he did not form the specific intent to kill because of a mental disorder. To support this defense, appellant offered testimony from a neuropsychologist that, based on his evaluation as well as a review of appellant's medical records, appellant suffered from major neurocognitive disorder, previously known as dementia, at the time of the offense. Through cross-examination of the neuropsychologist, it was revealed he had relied on two sets of medical records, one for appellant and the other for another individual with the same first and last name as appellant but a different middle initial and date of birth. Appellant's sole contention on appeal is that his trial counsel providing medical records for the wrong person to the neuropsychologist constituted ineffective assistance of counsel. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution

On March 3, 2015, at approximately 1:00 a.m., law enforcement responded to a 911 call at the residence of appellant and his wife, Alfa.¹ When the officers arrived, appellant and Alfa's daughter, Ana, was standing outside the residence hysterical, screaming for an ambulance, and saying, "He's inside. He's holding a knife. He's stabbing my mom." Appellant was inside the house in the living room holding what appeared to be a knife. Alfa and her mother, Ernestina, were also in the living room with lacerations and blood on their persons. Law enforcement ordered appellant to drop the knife and get on the floor several times. Appellant eventually complied. A knife with a

¹ We refer to Alfa, the other victim, Ernestina, and Ana by their first names to protect their privacy. No disrespect is intended.

five-inch blade was later found on the living room floor. Appellant had blood on his hands and clothing and was placed in the patrol vehicle. Appellant's demeanor was calm and cooperative. He appeared to be "a bit slow" but receptive to commands.

Alfa testified her marriage to appellant was not very good, and they slept in separate bedrooms. On March 1, 2015, Alfa arrived home from Las Vegas where she attended her brother's wedding. She had been planning to go out of town again with Ernestina to see one of Ernestina's friends. On March 2, 2015, around 7:00 p.m., Alfa told appellant of her intentions to go out of town, and appellant told her he did not want her to go. Appellant got upset and raised his voice at both Alfa and Ernestina. After the arguments, appellant went to the living room, and Alfa and Ernestina went to a bedroom. Alfa decided to stay with Ernestina in the bedroom because Ernestina was not feeling well. They got in bed around 10:00 p.m. At some point, Alfa heard the door open, but a moment passed, and she did not hear anyone come in. The next thing Alfa noticed was Ernestina reaching out to her and saying, "Juan is killing me." Alfa then saw appellant with a knife in his hand and Ernestina with lacerations. Alfa tried protecting Ernestina, and appellant began cutting Alfa with the knife. Alfa told appellant to stop, but he did not respond. Alfa screamed for Ana. Ana came into the bedroom, turned on the lights, and tried protecting Alfa and Ernestina, when appellant pushed Ana away and said, "[n]ot you." Alfa and Ernestina were able to get out of the bedroom and went to the living room, where appellant continued "cutting . . . and cutting" Alfa. Appellant said to Ernestina, "So you're gonna take her? You're gonna take her like that?" Ernestina replied, "No, I'm not taking her anywhere." Appellant replied, "You're gonna take her, but dead." Appellant continued cutting Alfa and Ernestina in the living room. Alfa confirmed the knife seized by the police came from her kitchen and that appellant had to walk across the living room from the kitchen to get to the bedroom where he stabbed them. Alfa sustained multiple stab wounds to her face, neck, and arms. Ernestina had multiple stab wounds to her face, neck, and hands. The emergency room doctor who

treated them testified that their injuries were serious. Alfa testified she sustained nerve damage in her hand and cannot use her fingers properly.

Upon appellant's arrest, he was interviewed by a detective. The detective testified he communicated with appellant effectively and that appellant appeared coherent and able to understand the detective. A recording of appellant's interview was played for the jury. Appellant told the detective he had "a jealousy and panic attack." He stated he has diabetes and had not slept for many months because he takes care of his sick daughter. He got into an argument with Alfa because he did not want her to leave and did not like the people she was going to visit. Alfa told him she was going despite his not wanting her to. He begged her not to go because she had recently gone to Las Vegas against his will. He told the detective he is "no longer the man in charge at home. And that hurts. It feels bad." Following the argument, he had an anger attack he felt was affected by his diabetes. He felt himself "shaking and shaking" and did not know what to do. He tried containing himself by walking back and forth between the inside of the house and the backyard. He got angrier as the hours passed. As he walked by the kitchen, he decided to get a knife from the kitchen counter. He thought about what he should do and told himself " 'I'm going to have to scare her.' " He went into the bedroom with the knife to attack Alfa, but accidentally stabbed Ernestina. When he realized it was not his wife, he jumped to the other side of the bed. It "wasn't [his] plan" to attack Ernestina. He only cut her because she "got in the way." He stated he had "an attack . . . from nerves, from anger, from emotion, from pain." He thought "it was the only solution." He stated that while he was stabbing them, they covered themselves and said, " 'Juan wants to kill us.' " He said he had the knife in his right hand and put a knee on the bed and cut Alfa around her face. He was so angry he "could[no]t see." He hit Alfa and told her he wanted her to change and not leave. He asked Ernestina if she was taking his wife away. Ana asked him why he wanted to hurt her mom, and he responded, " 'You know why. Don't you understand? I'm fed up with her.' " He told the detective he felt guilty and sad, that he

was telling the truth about what happened, that he wanted to attack his wife because of anger and jealousy, and she and her mother made him angry every day.

Defense

Ana testified on behalf of her father. She testified that she had health problems including seizures that caused her to sleepwalk, and appellant took care of her at night, so she would not walk out of the house. Appellant also cleaned a portable toilet she used and changed her diapers. He fed her, took her to appointments, and made sure she took her medications. Ana never saw him check his insulin or take his medication. On March 3, 2015, Ana heard screaming, so she got out of bed to see where it was coming from. She went to the room where Ernestina was staying, saw a lot of blood, and called 911. She described the argument appellant got into with Alfa before they went to bed as a “horrible, horrible fight.” Appellant also got into an argument with Ernestina about going out of town with Alfa. They argued about the people Alfa and Ernestina were going to visit.

Appellant testified in his own defense. He stated he was diagnosed with type 2 diabetes in 2000. His blood-sugar levels fluctuated from high to low, and sometimes he forgot to take his insulin. He testified he has a lung that does not work due to valley fever and that he was electrocuted in 2000 or 2001 and has trouble remembering. Appellant took care of Ana. In the days leading up to the incident, he was not sleeping or taking care of his diabetes well. On March 2, 2015, he had not taken insulin for a few days. On the night before the incident, he got into an argument with Alfa about her leaving. After everyone went to bed, he could not sleep. He walked around and in and out of the house for two to three hours. He felt nervous and traumatized because of the argument. He went into the kitchen, and his head was not working well. He did not know how it happened, but he took a knife. Then he went to the bedroom and attacked both Alfa and Ernestina. He thought the first person he attacked was his wife. He testified he felt “[u]nsure about me, where I was and what I was doing.” After his

daughter called 911, he continued attacking both women in the living room. He said he was not conscious while he was attacking his wife. He testified he did not know what was happening to him.

On cross-examination, appellant testified he was checked by a doctor for his diabetes before being booked into jail. The doctor cleared him, and he was booked into jail that same day. He testified that when Alfa told him she was leaving, it made him angry. Alfa was dressing provocatively when she would leave the house. Appellant testified he disapproved of Ernestina not being with her husband. He was angry when Alfa told him she was going despite his not wanting her to go and got even more angry when Ernestina told him she was going with Alfa whether he wanted her to or not. After they went to bed, he got angrier because Alfa had disrespected him in his role as a husband. Thinking about Alfa and Ernestina made him more and more shaky, and he lost control of his anger. He testified he did not intend to kill anyone. He stabbed his wife in the neck for about three to four minutes and continued to stab her after his daughter saw him. He testified he was motivated by anger, jealousy, and diabetes, and “got lost.” His diabetes has an effect on his ability to think straight and was exacerbated by his anger.

Thomas Middleton, Ph.D., a neuropsychologist, testified he evaluated appellant in October 2015. He obtained a medical background from appellant which included diabetes, valley fever, and electrocution. He also administered a series of tests to determine appellant’s brain function, which he described in detail, and to which appellant performed poorly.

Based on how appellant performed on the tests, Middleton opined appellant has impaired executive function. Middleton testified executive function in the frontal lobe of the brain has to do with an individual’s ability to plan, organize, and carry out activities. It has to do with behavioral control and impulse control. In other words, it prevents one from doing things they should not do. Middleton testified that if a person with impaired

executive function becomes stressed, confused, anxious, or panicky, which can be due to anger or jealousy, they are not able to regulate the emotion.

Middleton gave appellant the primary diagnosis of major neurocognitive disorder, formerly known as dementia, and opined appellant suffered from the disorder on the date of the offense. He opined the disorder was caused by appellant's previous case of valley fever, his electrocution, and diabetes. He testified valley fever is a fungal infection that goes in through the lungs, but it can cause a brain fever and result in brain damage. Because appellant told Middleton he contracted valley fever in the 1980's and was off work for five years, Middleton opined appellant had a severe case of valley fever. Middleton testified that electrocution injuries can also cause brain damage, which is further complicated by diabetes. He testified that appellant's medical records showed his glucose levels ranged from extreme highs to extreme lows and explained this can affect one's neurocognitive ability because plaques and tangles, commonly associated with dementia, memory loss or brain damage, build up. He testified that neurocognitive disorder is recognized by the "Diabetes Association" and the "Alzheimer's Association" as "Type 3 diabetes." Because appellant's medical records showed that appellant was losing sight and function of his fingers and toes, Middleton opined that appellant was losing brain function as well.

Middleton explained appellant's diagnosis affects one's ability to reason and control impulses. If an individual has severely impaired executive functions, he may lose control of his behavior in a given situation. This can be compounded further by an acute diabetic crisis if he was not taking his medication. He testified appellant's neurocognitive disorder affected his judgment and social behavior.

Verdict and Sentencing

Appellant was convicted of two counts of premeditated attempted murder of Alfa and Ernestina (Pen. Code,² §§ 187, subd. (a), 189, 664; counts 1 & 2), two counts of assault with a deadly weapon against Alfa and Ernestina (§ 245, subd. (a)(1); counts 3 & 4), and one count of corporal injury of a spouse against Alfa (§ 273.5, subd. (a); count 5). The jury found true appellant personally used a deadly weapon (§ 12022, subd. (b)(1)) during the commission of count 1. On counts 1, 2, 3, and 4, the jury found true he inflicted great bodily injury in the case of Alfa (§ 12022.7, subd. (e)) and great bodily injury against someone 70 years of age or older in the case of Ernestina (§ 12022.7, subd. (c)). On count 5, the jury found true appellant personally used a deadly weapon (§ 12022, subd. (b)(1)) and inflicted great bodily injury upon Alfa (§ 12022.7, subd. (e)).

The court imposed “with great reluctance” the middle term on all determinate sentences. On count 1, appellant was sentenced to a life term with the possibility of parole plus consecutive terms of one year for the use of a deadly weapon enhancement and four years for the great bodily injury enhancement. On count 2, appellant was sentenced to a life term with the possibility of parole plus consecutive terms of one year for the use of a deadly weapon enhancement and five years for the great bodily injury enhancement. Appellant’s determinate terms on counts 3, 4, and 5, and the enhancements attached thereto, were stayed pursuant to section 654. Appellant was sentenced to a total of two consecutive life terms with the possibility of parole plus a determinate term of 11 years.

DISCUSSION

During the cross-examination of Middleton, the prosecutor brought to Middleton’s attention that one set of the medical records on which Middleton had relied belonged to

² All further statutory references are to the Penal Code unless otherwise noted.

an individual with the same first and last name as appellant but a different middle initial and birthdate. The following colloquy occurred between Middleton and the prosecutor:

“Q. So the individual’s date of birth in the ‘90s records versus these records are different; isn’t that correct?

“A. Well, we have different sets of records, so I have two sets going back to 1993. I have this for Juan [M.] from 2006 back to 1993, and I have records for [appellant] going back to 2006 and 2007.

“Q. And just, for example, in this medical record, like the one I just showed you[,] . . . [t]he doctor notes he’s been a diabetic for the past 12 years. [¶] . . . [¶]

“A. . . . Twelve years.

“Q. Which would be consistent, if this record was dated 3/6/2012, about having diabetes since 2000?

“A. Yes. [¶] . . . [¶]

“Q. And some of those medical records from the ‘90s have a different date of birth than [appellant’s date of birth]; isn’t that true?

“A. That’s what you were pointing out, yes. [¶] . . . [¶]

“Q. Would that affect your opinion about the severity of his diabetes?

“A. No.”

Appellant contends that defense counsel’s providing records relating to a person other than appellant to Middleton constituted ineffective assistance of counsel because there was no strategic or tactical reason for defense counsel not to have reviewed the records or to have provided records to Middleton for a different person. Appellant argues he was prejudiced because counsel’s acts caused Middleton’s credibility to be undermined. We acknowledge that defense counsel providing the records to Middleton for a person other than appellant was clearly inadvertent error, but we need not decide

whether counsel's performance was deficient because appellant has not carried his burden of showing prejudice resulted from the error.

An appellant claiming ineffective assistance of counsel under the federal or state Constitution must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome. (*People v. Ochoa* (1998) 19 Cal.4th 353, 414.) As the United States Supreme Court has observed, the prejudice component of ineffective assistance focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 372.) A reviewing court will find prejudice when a defendant demonstrates a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Gurule* (2002) 28 Cal.4th 557, 610.)

We cannot say there is a reasonable probability that but for the error, the outcome of the trial would have been different. The portion of the cross-examination where the prosecutor pointed out some of the records Middleton had reviewed were for another individual was brief. In the reporter's transcript, it accounted for approximately two out of 40 pages of cross-examination. The medical record mix-up was insignificant based on the amount of impeachment as a whole.

The majority of cross-examination was devoted to discrediting Middleton. The prosecutor started cross-examination by eliciting that Middleton was hired by the defense and about 15 to 20 percent of his income comes from evaluations he does for the public defender's office. The prosecutor elicited that Middleton is not a medical doctor and has not physically treated a person with valley fever, electrocution, or diabetes. Middleton testified he personally cannot diagnose valley fever or diabetes. The prosecutor confirmed that Middleton based appellant's diagnosis of major neurocognitive disorder as

a result of medical conditions including electrocution, diabetes and valley fever on the battery of psychological tests he administered. The prosecutor also elicited from Middleton that brain damage can be diagnosed by medical tests, such as a positron emission tomography (PET) scan, and that appellant was not administered any such tests.

The prosecutor's pointing out that one of the sets of medical records was for the wrong individual was just one of the many ways the prosecutor challenged Middleton's reliance on the records. Middleton admitted there was only a mention of valley fever in the records but no diagnosis or treatment. He also stated he did not review any medical records regarding appellant's electrocution. Rather, Middleton based his opinion regarding appellant's valley fever and electrocution on defense counsel's confirmation of appellant's medical history by appellant's son. There were no independent medical diagnoses in the records documenting the severity of the electrocution, and the only documentation regarding the electrocution was a statement of a layperson witness, which stated it was fortunate that appellant did not suffer serious injury as a result of the incident. On redirect examination, Middleton testified that appellant had memory deficits and problems retrieving information consistently stating, "He's essentially oblivious of a lot of his history and symptoms." On recross-examination, the prosecutor pointed out that Middleton testified he relied on appellant for his medical history of valley fever and the severity of his electrocution despite his comment on redirect that appellant is "oblivious."

The prosecutor presented Middleton with multiple evaluations of appellant by other doctors and clinicians, which Middleton had reviewed in preparing his report, and questioned him on their effect on his diagnosis. These evaluations included the following conclusions: (1) the doctor who cleared appellant to go to jail reported appellant's diabetes was under control and no neurological deficit was observed approximately four hours after the attacks on Alfa and Ernestina; (2) a forensic psychologist who evaluated appellant did not identify anything indicative of a mental disorder leading up to the

circumstances of the attacks and specifically ruled out or did not detect any evidence of dementia; (3) another psychologist who evaluated appellant did not make any formal diagnoses; and (4) a psychiatrist specifically did not detect dementia and noted that appellant's thinking process was intact and his memory, recent and remote, was adequate. The prosecutor also pointed out appellant's treating physician had never diagnosed him with dementia. The prosecutor questioned Middleton about whether neurocognitive disorder would affect someone's ability to cook meals and manage a loved one's medication, to which Middleton replied, "[p]erhaps." If the jury found Middleton not credible, it was not because of the error regarding the medical records.

Further, Middleton was clear that his opinion was not dependent upon either set of medical records. Middleton testified that it is "nice" to have medical records which address the foundation for the neurocognitive disorder, but his test results stand on their own and no matter what appellant's medical history is, it comes down to how he is currently functioning, and appellant shows severe impairment. Middleton testified at length regarding the tests he gave appellant that contributed to his diagnosis.

Finally, Middleton's testimony was offered for the limited purpose of determining whether appellant actually formed the specific intent to kill at the time of the incident³

³ Middleton's testimony was offered to support a "diminished actuality" defense. Section 28, subdivision (a) provides, in pertinent part, that evidence of mental illness "shall not be admitted to show or negate the *capacity* to form any mental state," but is "admissible solely on the issue of whether or not the accused *actually formed* a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (Italics added.) Subdivision (b) of section 28 abolishes the defenses of diminished capacity, diminished responsibility, and irresistible impulse "[a]s a matter of public policy."

Section 29 provides that any expert testifying in the guilt phase of a criminal action "shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." Thus, the only

and the jury was properly instructed of this limited purpose. There was ample evidence before the jury that appellant formed the specific intent to kill, particularly his own statements. When he was interviewed the day of the attacks, he was able to recount in detail an account that correlated closely with Alfa's. He told the detective and testified that he had tried to contain himself by walking around for hours before deciding to get the knife. He told the detective he thought about what he should do, and he went into the bedroom with a "plan." He wanted to attack Alfa. He also demonstrated he was able to make decisions during the attack, when he realized he was stabbing Ernestina, so he switched to Alfa. He told the detective and testified he attacked out of anger and jealousy. Alfa testified that while he was stabbing her, he told Ernestina Alfa would have to be taken on the trip "dead."

Though defense counsel's error may have exacerbated the issue with Middleton's credibility, it certainly was not the reason the jury rejected appellant's defense. For the foregoing reasons, we reject appellant's ineffective assistance of counsel claim.

DISPOSITION

The judgment is affirmed.

DE SANTOS, J.

WE CONCUR:

PEÑA, Acting P.J.

SMITH, J.

value Middleton's testimony had was to show that appellant did not form the specific intent to kill on the night of the incident.